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Office of Administrative Law Judges
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Issue Date: 27 January 2003

Case No: 2002-BLA-0308

In the Matter of

ALBERT NAPIER,
Claimant

v.

FARMERS SUPPLY & EXPLOSIVES, INC.,
Employer,

BROWN NEACE TRUCKING,
Employer,

and

OLD REPUBLIC INSURANCE COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Albert Napier
Pro se

Lois A. Kitts, Esquire
For Brown Neace Trucking/Carrier

Anne T. Knauff, Esquire
For the Director

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On May 3, 2002, this case was referred to the Office of Administrative Law Judges for a formal hearing. (DX 38). Following proper notice to all parties, a hearing was held on October 1, 2002 in Hazard, Kentucky. The Director's exhibits were admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues remain for resolution:

1. the length of the miner's coal mine employment;

2. whether the miner has pneumoconiosis as defined by the Act and regulations;

3. whether the miner's pneumoconiosis arose out of coal mine employment;

4. whether the miner is totally disabled;

5. whether the miner's disability is due to pneumoconiosis;

6. whether the named employer is the responsible operator; and

7. whether the miner's most recent period of cumulative employment of not less than one year was with the responsible operator.

Brown Neace Trucking also contests other issues that are identified at line 18 on the list of issues. (DX 38). These issues are beyond the authority of an administrative law judge and are preserved for appeal. Furthermore, Brown Neace contests the timeliness of Claimant's claim and his status as a miner. Because I dismiss Brown Neace from the instant case, and because the Director does not challenge those issues, I do not address them.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, Albert Napier, was born on April 18, 1955. (DX 1, 7). Currently, he lives in Altro, Kentucky. (Tr. 11). Mr. Napier completed his general education degree, and he has not remarried since his divorce in 1996. (DX 1). He had no children who were under eighteen or dependent upon him at this time this claim was filed. *Id.*

Claimant's medical history reveals numerous accidents and physical problems. Claimant quit underground coal mining in 1982 after a knee injury in a car accident. (Tr. 30). That same year, Claimant was involved in a motor vehicle accident requiring steel implant facial surgery. (Tr. 30-31). In 1989, Claimant underwent surgery for a recurrent left pneumothorax. In 1989, he had surgery on his right kidney, and he has suffered from recurrent kidney stone problems. In July 1999, he suffered head injuries while working as a truck driver when his truck door swung open and hit him; however he is not suffering recurring effects from the injury at this time. (Tr. 27, 38). Claimant also testified to being injured in a recent forklift accident in New Jersey. (Tr. 65).

Claimant experiences trouble breathing, and he uses a non-prescription Combivent inhaler. (Tr. 31, 37-38). He uses the inhaler approximately once per week, but he is not currently seeing a physician for his breathing difficulties. (Tr. 37, 64). Other than his inhaler, Claimant takes no other medicine. (Tr. 64).

At the formal hearing, Claimant did not testify about his smoking history. The medical record of the instant case records vastly different smoking histories from the Claimant. As these figures apparently originate with histories Claimant provides his examining doctors, it appears that Claimant has reported different smoking histories to different doctors at different times. In 1994 alone, Claimant reported the following histories: 1) twenty-two years of smoking one pack

per day; 2) seventeen years of smoking one and one-half packs per day; 3) fifteen years of smoking one pack per day; and 4) ten years of smoking one pack per day. (DX 10). In 2000, Claimant reported smoking histories of eighteen years at one-half pack per day and twenty years at one pack per day. (DX 11, 18). It is impossible for this Court to determine the length of Claimant's smoking history; however, the record clearly demonstrates that Claimant possesses a substantial, continuous smoking history approximately two decades in length.

Mr. Napier filed his application for black lung benefits on June 29, 2000. (DX 1). The Office of Workers' Compensation Programs denied the claim on September 26, 2000, and, after reviewing additional evidence, affirmed its denial on December 4, 2000 and November 19, 2001. (DX 12, 21, and 35). Pursuant to claimant's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges. (DX 37, 38).

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. *See Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). The evidence in the record includes a Social Security Statement of Earnings encompassing the years 1968 to 1999, employment history forms, applications for benefits, and claimant's testimony. (DX 1-7; Tr. 25-87). At the formal hearing, the Director stipulated to seven years of coal mine employment. (Tr. 24).

On his application for benefits, Claimant alleged twenty-five years of coal mine employment. (DX 1). On his employment history form, (DX 2), Claimant listed the following coal mine employers and work dates:

Employer	Date
1. Leeco, Inc.	May 1973 to February 1976
2. Gibson Coal, Inc.	March 1977 to August 1977
3. North American Mining	March 1978 to September 1978
4. Buckhorn Mining	November 1978 to July 1979
5. Kescoal, Inc.	November 1979 to August 1981
6. Tesoro Coal	August 1981 to February 1982
7. Virgil Raleigh Trucking	November 1982 to September 1988
8. Brown Neace Trucking	September 1988 to July 1993
9. Gayhart Trucking	August 1993 to May 1994
10. Farmers Supply & Explosives	June 1994 to June 1996

During the hearing, Claimant testified extensively about his various coal mine employers. (Tr. 45-64, 68-69). His testimony, however, conflicts to a certain degree with his written allegations of coal mine employment, although the discrepancies are no more than one would expect to

be caused by a career filled with multiple employers spanning, and overlapping, many years. To be sure, however, I shall utilize Claimant's Social Security records and the applicable regulatory formula to compute the length of Claimant's coal mine employment. 20 C.F.R. § 725.101 (a)(32)(iii)

The length of a miner's coal mine work history must be computed as provided by 20 C.F.R. § 725.l01(a)(32). *See* 20 C.F.R. § 718.301. The provisions at § 725.101(a)(32), in turn, read as follows:

> Year means a period of one calendar year (365 days, or 366 days if one day is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.' A 'working day' means any day or part of a day for which the miner received pay for work as a miner, but shall not include any day for which the miner received pay while on approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.
>
> > (i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125. Proof that the miner worked more than 125 working days in a calendar year or partial periods totaling a year, shall not establish more than one year.
> >
> > (ii) to the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment shall be ascertained. The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it shall be presumed in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.
> >
> > (iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported

> by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made part of the record if the adjudication officer uses this method to establish the length of the miner's work history.
>
> (iv) No periods of coal mine employment occurring outside the United States shall be considered in computing the miner's work history.

20 C.F.R. § 725.101(a)(32). To determine which employers are coal mine employers, I have compared the companies listed in Claimant's Social Security records with those he testified or alleged in writing were engaged in coal mine work.

The Social Security records provide that Claimant earned $2,131.70 in 1974 from coal mine employment with Leeco, Inc. The average daily wage that year was $48.64. Thus, Claimant's earnings would reflect 43.83 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.35 year of coal mine employment for 1974.

The records provide that Claimant earned $360.00 in 1978 from coal mine employment with G & Y Coal Company, Inc. The average daily wage that year was $80.31. Thus, Claimant's earnings would reflect 4.48 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.04 year of coal mine employment for 1978 for G & Y Coal Company, Inc.

Claimant earned $1,392.60 in 1978 from coal mine employment for Squabble Creek Coal Company. The average daily wage that year was $80.31. Thus, Claimant's earnings would reflect 17.34 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.14 year of coal mine employment for 1978 for Squabble Creek Coal Company.

Claimant earned $2,002.01 in 1979 from coal mine employment with Pine Branch Coal Sales, Inc. The average daily wage that year was $87.03. Thus, Claimant's earnings would reflect 23.00 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.18 year of coal mine employment for 1979.

In 1980, Claimant earned $12,366.77 from coal mine employment with Kescoal, Inc. The average daily wage that year was $87.42. Thus, Claimant's earnings would reflect 141.46 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 1 year of coal mine employment for 1980.

The Social Security records provide that Claimant earned $15,419.32 in 1981 from coal mine employment with Kescoal, Inc. and Tesoro Coal Company. The average daily wage that year was $96.80. Thus, Claimant's earnings would reflect 159.29 working days that year. As the

regulations provide that one year equals 125 working days, I credit Claimant with 1 year of coal mine employment for 1981.

Claimant earned $979.25 in 1982 from coal mine employment with Tesoro Coal Company and Sun Fire Coal Company. The average daily wage that year was $101.59. Thus, Claimant's earnings would reflect 9.64 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.08 year of coal mine employment for 1982.

Claimant earned $8,698.00 in 1984 from coal mine employment Virgil Raleigh Coal Company. The average daily wage that year was $118.40. Thus, Claimant's earnings would reflect 73.46 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.59 year of coal mine employment for 1984.

I credit Claimant with two years of coal mine employment from 1985 to 1986. The Social Security records demonstrate full, calendar year employment in those years with Virgil Raleigh Coal Company. The dates also comply with Claimant's allegations. Under 20 C.F.R. § 725.101 (a)(32)(ii), proof of full calendar year employment entitles Claimant to a presumption of one year of coal mine employment. Accordingly, I so credit Claimant with two years of coal mine employment.

The Social Security records provide that Claimant earned $11,493.00 in 1987 from coal mine employment with Virgil Raleigh Coal Company. The average daily wage that year was $126.00. Thus, Claimant's earnings would reflect 91.21 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.73 year of coal mine employment for 1987.

The records provide that Claimant earned $1,377.00 in 1988 from coal mine employment with Joe Maggard. The average daily wage that year was $127.52. Thus, Claimant's earnings would reflect 10.80 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.09 year of coal mine employment for 1988.

Claimant earned $16,706.95 in 1990 from coal mine employment with Brown Neace Trucking. The average daily wage that year was $133.68. Thus, Claimant's earnings would reflect 124.98 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 1 year of coal mine employment for 1990.

I credit Claimant with one year of coal mine employment for 1991. The Social Security records demonstrate full, calendar year employment in that year with Brown Neace Trucking. The date also complies with Claimant's allegations. Under 20 C.F.R. § 725.101(a)(32)(ii), proof of full calendar year employment entitles Claimant to a presumption of one year of coal mine employment. Accordingly, I so credit Claimant with one year of coal mine employment in 1991.

The Social Security records provide that Claimant earned $10,217.22 in 1992 from coal mine employment with Brown Neace Trucking. The average daily wage that year was $137.60. Thus, Claimant's earnings would reflect 74.25 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.59 year of coal mine employment for 1992.

Claimant earned $2,501.86 in 1993 from coal mine employment with Farmers Supply & Explosive. The average daily wage that year was $138.08. Thus, Claimant's earnings would reflect 18.12 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.14 year of coal mine employment for 1993.

I credit Claimant with two years of coal mine employment from 1994 to 1995 for Farmers Supply and Explosives. The Social Security records demonstrate full, calendar year employment in those years. The dates also comply with Claimant's allegations. Under 20 C.F.R. § 725.101 (a)(32)(ii), proof of full calendar year employment entitles Claimant to a presumption of one year of coal mine employment. Accordingly, I so credit Claimant with two years of coal mine employment for 1994 and 1995.

Claimant earned $12,285.00 in 1996 from coal mine employment with Farmers Supply & Explosive. The average daily wage that year was $149.92. Thus, Claimant's earnings would reflect 81.94 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.66 year of coal mine employment for 1996.

In sum, I credit Claimant with 11.59 years of coal mine employment.

Claimant testified that he last worked in the coal mine industry in 1996 for Farmers Supply & Explosives, Inc. (Tr. 26). Claimant stated that his employment with Farmers Supply lasted for approximately nineteen months. (Tr. 31). During his employment, he hauled ammonia nitrate. (Tr. 32). During the final three months of his employment with Farmers Supply, Claimant began to work long hauls. (Tr. 42). From 1996 to 2000, Claimant hauled freight in his own semi-tractor trailer truck. (Tr. 26). Claimant testified that his self-employment from 1996 to 2000 was not related to coal mine employment. (Tr. 35).

Responsible Operator

An administrative law judge is required to go back up the chain of operators for which the claimant worked until the most recent operator, which meets the regulatory requirements and has the financial ability to pay, is identified. *See Cole v. East Kentucky Collieries*, 20 B.L.R. 1-51 (1996). In order to be deemed the responsible operator for this claim, Farmers Supply & Explosive must have been the last employer in the coal mining industry for which Mr. Napier had his most recent period of coal mine employment of at least one year, including one day after December 31, 1969. 20 C.F.R. §§ 725.492(a), 493(a).

The Social Security records and claimant's employment history forms establish that Farmers Supply & Explosive was the last employer to meet these conditions. (DX 2, 7). Therefore, I find that Farmers Supply & Explosive is the responsible operator.

The regulations also require that the operator be capable of assuming its liability for the payment of continuing benefits. 20 C.F.R. §725.492(a)(4). Section 725.492(b) provides that ability to pay benefits is presumed upon a showing that the entity exists, absent evidence to the contrary. At the hearing, the Director objected to the dismissal of Brown Neace Trucking from the case, maintaining that Farmers Supply & Explosive was not insured on Claimant's last day of employment. (Tr. 20-21). The record, however, is devoid of any evidence of Farmers Supply & Explosive's inability to pay benefits, if awarded. First, Farmers Supply & Explosives has not challenged liability before this Court.[1] Secondly, the Benefits Review Board directs that the burden to contest the ability to pay rests with the responsible operator itself. "The burden of proof with respect to [a responsible operator's ability to pay] is clearly upon the putative responsible operator, because the regulations provide a rebuttable presumption of liability." *Gilbert v. Williamson Coal Company, Inc.*, 7 B.L.R. 1-289, 1-284 (1984)(citing 20 C.F.R. §725.492(b)). The presumption is not overcome by the mere assertion by the employer or any other party of the primary responsible operator's inability to pay. *Id.*; *see also Borders v. A.G.P. Coal Company*, 9 B.L.R. 1-32, 1-34 through 1-35 (1986)(holding that assertions of inability to pay by employer's counsel and claimant were inadequate to rebut presumption).

As I have concluded that Farmers Supply & Explosives is the properly designated responsible operator, I dismiss Brown Neace Trucking from the instant claim.

[1] Farmers Supply & Explosives has not participated in the litigation of the case, and, at the hearing, I ruled that Farmers Supply was estopped from contesting liability due to their absence. *See* 20 C.F.R. §725.413(a)(3). In its only participation in the instant claim, Farmers Supply & Explosives contested the length of Claimant's employment with the company when asked by the district director. (DX 27). The Claimant's allegations and the Social Security records, however, demonstrate that Claimant was employed with the company much longer than the company admitted or realized. (DX 2, 7).

Medical Evidence

A. X-ray reports[2]

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 10	02/26/94	02/27/94	Dahhan	Negative
DX 28	03/07/94	03/14/01	Wiot/B/BCR	Negative
DX 28	03/07/94	03/23/01	Spitz/B	Negative
DX 10	03/12/94	03/21/94	Dineen	Negative
DX 10	03/21/94	04/13/94	Jarboe/B	Negative
DX 28	03/21/94	03/14/01	Wiot/B/BCR	Negative
DX 28	03/21/94	03/23/01	Spitz/B	Negative
DX 10	03/26/94	04/06/94	Wright	Negative
DX 11	07/11/00	07/11/00	Wicker/B	Negative
DX 11	07/11/00	07/29/00	Sargent/B/BCR	Completely negative
DX 19	07/11/00	10/24/00	Wiot/B/BCR	Completely negative
DX 20	07/11/00	10/28/00	Spitz/B	Negative
DX 18	09/15/00	09/15/00	Broudy	Completely negative
DX 28	09/15/00	03/14/01	Wiot/B/BCR	Negative
DX 28	09/15/00	03/23/01	Spitz/B	Negative

[2] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. §718.102(a,b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

B. Pulmonary Function Studies[3]

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
DX 10 08/11/93	Baker	38 66’	3.02	3.73			No	
DX 10 02/26/94	Dahhan	38 66.25’	2.82	3.44		0.82	Yes	Less than maximal effort with fair cooperation and good comprehension. “Question possible restrictive defect.”
DX 10 03/07/94	Broudy	38 67’	2.82	3.70	126	0.76	Yes	Effort satisfactory. Slight restrictive defect.
DX 10 03/21/94	Dineen	38 66’	2.93	3.74	136	0.78	Yes	Good effort.
DX 10 03/26/94	Wright	38 70’	2.71	3.59			Yes	Normal
DX 11 07/11/00	Wicker	45 67’	2.32 1.07*	2.89 2.00*	57 40*		Yes	Poor cooperation. Good comprehension.
DX 18 09/15/00	Broudy	45 66’	2.27 2.39*	3.14 3.13*	70 77*	0.72 0.76*	Yes	Suboptimal effort.

*denotes testing after administration of bronchodilator

[3] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. §718.104 (c) . The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Board has held that a ventilatory study which is accompanied by only two tracings is in “substantial compliance” with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

Validation Studies:

On July 30, 2000, Dr. N. K. Burki, board-certified in internal medicine with a pulmonary subspecialty, issued a validation opinion addressing Claimant's July 11, 2000 pulmonary function test. (DX 11). Dr. Burki stated that the test results were invalid due to less than optimal effort, cooperation, and comprehension. The doctor indicated that the curve shapes of the test tracings indicated poor effort.

C. Arterial Blood Gas Studies[4]

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise	Comments
DX 10	08/11/93	Baker	42.1	93.2	Resting	
DX 10	02/26/94	Dahhan	39.7 39.6	97.6 98.4	Resting Exercise	Exercise terminated due to fatigue and shortness of breath
DX 10	03/07/94	Broudy	42.2	96.4	Resting	Normal except marked elevation of carboxy-hemoglobin.
DX 10	03/26/94	Wright	43.5	101.8	Resting	Normal
DX 11	07/11/00	Wicker	40.4 41.2	114.7 122.8	Resting Exercise	
DX 18	09/15/00	Broudy	42.3	96.2	Resting	Normal, except for elevated carboxy-hemoglobin.

D. Narrative Medical Evidence

On February 26, 1994, Dr. Abdul Dahhan examined Claimant. (DX 10). Claimant presented Dr. Dahhan with a twenty-one year coal mine employment history, including ten years of underground work as a general laborer and foreman and eleven years of work on the surface as a

[4] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. §718.105(a).

truck driver. Dr. Dahhan noted that Claimant smoked one pack of cigarettes per day, and had a twenty-two year smoking history. Claimant's chief symptoms were daily cough with sputum production, occasional wheezing, dyspnea upon exertion such as two flights of stairs, and occasional chest pain. In addition to his physical examination, the doctor administered a chest x-ray, electrocardiogram, arterial blood gas study, and a pulmonary function test. Dr. Dahhan opined that Claimant did not suffer from coal workers' pneumoconiosis and that he retained the respiratory ability to perform his usual coal mine employment or comparable work in a dust free environment. The doctor stated that Claimant possessed a "possible mild restrictive defect," as a byproduct of his previous left thoracotomy.

Dr. Bruce C. Broudy examined Claimant on March 6, 1994. (DX 10). Claimant presented Dr. Broudy with an eighteen year coal mine employment history, consisting of ten years of underground coal mine work as a general laborer and scoop operator and eight years of surface mining as a coal truck driver. During the examination, Claimant complained of the following symptoms: shortness of breath, dyspnea upon exertion with strenuous labor, chronic cough, sputum production, wheezing, sleeplessness, and occasional chest pain. Dr. Broudy took Claimant's medical and social histories, and he noted that Claimant had been a smoker for the past seventeen years and currently smoked approximately one-half pack of cigarettes per day. Claimant informed him, however, that he did not smoke on the job. In addition to his physical examination, Dr. Broudy performed a pulmonary function test, arterial blood gas study, and chest x-ray on the claimant. The doctor reported that 1) the pulmonary function test showed a slight restrictive defect, 2) the arterial blood gas study was normal except for marked elevation of the carboxyhemoglobin indicating continued exposure to smoke, and 3) the x-ray films did not produce evidence of pneumoconiosis. Dr. Broudy concluded by diagnosing chronic bronchitis due to cigarette smoking. He did not diagnose coal workers' pneumoconiosis, nor did he address the effect of Claimant's coal dust inhalation on his chronic bronchitis. The doctor opined that the spirometry and blood gas results suggested that Claimant's dyspnea was non-pulmonary in origin. He attributed the slight restrictive defect revealed in the pulmonary function test results as possibly related to Claimant's previous surgery or less than maximum effort. Dr. Broudy concluded that Claimant retained the pulmonary ability to perform coal mine work or similarly arduous labor.

On March 21, 1994, Dr. John F. Dineen examined Claimant. (DX 10). Dr. Dineen recorded that Claimant had worked as a coal miner for twenty-one years, including ten years underground as a coal shooter, roof bolter, continuous miner, and scoop/drill operator and eleven years on the surface as a coal truck driver. The doctor took Claimant's medical and social histories, noting that Claimant had smoked approximately one pack of cigarettes per day for the past fifteen years. During the examination, Claimant relayed to the doctor the following symptoms: shortness of breath, dyspnea upon walking one-half mile on level ground or climbing two flights of stairs, daily cough, and sputum production. Dr. Dineen administered a physical examination, chest x-ray, pulmonary function test, and an arterial blood gas study. Dr. Dineen interpreted the x-ray film as negative for pneumoconiosis, and he opined that the pulmonary function test results

revealed minimal obstructive airway disease. The doctor concluded that the blood gas analysis was normal. Dr. Dineen opined that Claimant did not suffer from pneumoconiosis. The only stated basis for the doctor's opinion was Claimant's chest x-ray. He also concluded that Claimant suffered from no respiratory impairment and retained that pulmonary capacity to perform his usual coal mine employment. Dr. Dineen stated, "There is no radiographic, clinical or spirometric evidence that he has sustained any lung injury as a result of his occupational exposure to coal dust." *Id.* The doctor diagnosed chronic bronchitis secondary to Claimant's smoking habit, and he concluded that this condition was responsible for the minimal obstructive airway disease from which Claimant suffered.

Dr. Ballard D. Wright examined Claimant on March 26, 1994. (DX 10). Claimant presented Dr. Wright with a twenty-one year coal mine employment history consisting of eighteen years of underground employment as a cutting machine, scoop, and belt line operator and three years of above ground work as a coal truck driver. Dr. Wright also noted a ten year, one pack per day tobacco smoking history for the claimant. During the examination, Claimant complained of cough, shortness of breath, wheezing, sputum production, and chest pain. In addition to his physical examination, the doctor administered an electrocardiogram, chest x-ray, pulmonary function test, and an arterial blood gas study. Dr. Wright reported that the electrocardiogram demonstrated normal tracings, the chest x-ray revealed no interstitial nodulation, and the pulmonary function test and arterial blood gas study produced normal values. Dr. Wright diagnosed chronic smokers' bronchitis with little or no functional lung impairment, but he did not diagnose pneumoconiosis. Addressing Claimant's impairment level, the doctor opined that Claimant retained the pulmonary ability to perform the work of a coal miner. Dr. Wright concluded that any impairment symptoms were related to smoking.

Dr. Mitchell Wicker examined Claimant on July 11, 2000. (DX 11). Dr. Wicker reviewed Claimant's employment history form, and he recorded that Claimant possessed an eighteen year, one-half pack per day smoking history. Dr. Wicker listed Claimant's chief symptoms or complaints as cough, sputum production, wheezing, dyspnea with any manual labor, and chest pain with over exertion. In addition to his physical examination, the doctor administered a chest x-ray, pulmonary function study, arterial blood gas study, and an electrocardiogram. Dr. Wicker opined that Claimant did not suffer from pneumoconiosis. The only stated basis for his opinion is Claimant's chest x-ray. The doctor did not comment about Claimant's impairment level because "respiratory capacity cannot be determined due to failure to comply with testing protocol." *Id.*

On September 15, 2000, Dr. Broudy examined Claimant for a second time. (DX 18). Dr. Broudy took Claimant's personal and medical histories, recording that Claimant possessed a twenty year, one pack per day smoking habit. Claimant presented Dr. Broudy with a twenty-one year coal mine employment history, including ten years of underground mining as a shot fireman, roof bolter, and scoop operator and eleven years of surface mining as a truck driver. Claimant's chief complaints to the doctor were shortness of breath, cough, sputum production, occasional wheezing, and chest pain accompanying strenuous work. The doctor submitted Claimant to a

physical examination, pulmonary function test, arterial blood gas study, and a chest x-ray. Dr. Broudy commented that the pulmonary function test results revealed a mild restriction, and the arterial blood gas study results were normal, except for marked elevation of the carboxyhemoglobin indicating continued exposure to smoke. He also concluded that the chest x-ray was negative for pneumoconiosis. Dr. Broudy opined that Claimant suffered from chronic bronchitis due to cigarette smoking but not from coal workers' pneumoconiosis. He also stated that Claimant retained the physical ability to perform his usual coal mine employment. Dr. Broudy explained, "As noted, spirometry was not totally valid because of suboptimal effort. Based on the physical exam I suspect he has [a] mild impairment due to chronic bronchitis from cigarette smoking and that with better effort he would demonstrate an obstructive defect." *Id.*

Dr. Broudy's deposition was taken on December 6, 2000. (DX 23). Dr. Broudy explained that Claimant possessed a sufficient coal dust inhalation history to contract pneumoconiosis and a sufficient smoking history to develop chronic bronchitis and emphysema. (DX 23, p. 11-12). The doctor reiterated the findings of his previous two examinations. He added that the expiratory wheezes he observed usually suggested obstructive airways disease that was probably a result of cigarette smoking. (DX 23, p. 13). Dr. Broudy also testified that, despite Claimant's poor effort, his results on the pulmonary function test remained above federal disability standards. (DX 23, p. 15).

Dr. Jerome F. Wiot's deposition was taken on December 14, 2001. (DX 36). The doctor's testimony reiterated and explained his x-ray interpretations of record.

Dr. Broudy performed an independent medical review on September 5, 2002. (EX 2). The doctor reviewed the medical reports of five physicians, including himself and Drs. Dineen, Wicker, Dahhan, and Wright. He also reviewed several x-ray interpretations. After his review, the doctor opined that no evidence existed demonstrating coal workers' pneumoconiosis or chronic obstructive pulmonary disease, nor did there exist evidence of a totally disabling impairment. He opined that Claimant retained the pulmonary capacity to return to coal mine work.

On September 10, 2002, Dr. Matt Vuskovich, board certified in occupational medicine, performed an independent medical review. (EX 1). In his report, he cataloged the evidence contained within his review, including physical examination comments, sixteen x-ray interpretations, seven pulmonary function tests, nine arterial blood gas studies, and one physician deposition. Dr. Vuskovich also noted Claimant's medical and employment histories, as contained in various reports. The doctor stated that Claimant's exposure placed him at a potential risk to develop an occupational pulmonary disease; however, he concluded that the evidence did not support a diagnosis of pneumoconiosis. He based his opinion on the following factors: 1) a complete lack of x-ray interpretations supporting a positive pneumoconiosis diagnosis; 2) no pulmonary impairment demonstrated by objective testing; and 3) no evidence of chronic obstructive pulmonary disease. The doctor opined that Claimant maintained the pulmonary capacity to perform his coal mine employment.

Dr. Broudy's deposition was taken again on October 18, 2002.[5] The doctor's testimony addressed his independent medical review on September 5, 2002. The doctor testified that Claimant possessed both significant smoking and coal dust inhalation histories. (Broudy Depo., p. 12-13). The remainder of his testimony merely reiterated the written findings of his report on September 5, 2002.

E. Miscellaneous Evidence

The record contains medical records from Appalachian Regional Healthcare. (DX 9). The records include treatment notes, admission/discharge summaries, and x-ray reports. In those records, the presence or absence of pneumoconiosis is not addressed. The records also include a pathology report, however, performed on Claimant's lung tissue by pathologist Dr. Shiu-Kee Chan on July 17, 1987. Dr. Chan diagnosed "Fragments of lung tissue with focal fibrosis and emphysema, clinically associated with recurrent pneumothorax, left." *Id.*

DISCUSSION AND APPLICABLE LAW

Because Mr. Napier filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pneumoconiosis and Causation

The new regulatory provisions at 20 C.F.R. § 718.201 contain a modified definition of "pneumoconiosis" and they provide the following:

(a) For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.

(1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This

[5] By permission of the Court, the doctor's deposition was taken post-hearing.

definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Dec. 20, 2000). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Each shall be addressed in turn.

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark*, 12 BLR 1-149 (1989).

The record contains fifteen interpretations of seven chest x-rays. Of these interpretations, all were negative for pneumoconiosis. Accordingly, I find the preponderance of the x-ray evidence is negative for pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence. Dr. Chan's biopsy diagnosis of emphysema satisfies the regulatory definition of legal pneumoconiosis, if arising out of coal mine employment.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no

such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

The instant record contains numerous physician examination reports, independent medical reviews, and depositions. Each shall be discussed and weighed individually.

Dr. Dahhan opined that Claimant did not suffer from pneumoconiosis. I find his opinion well documented; however, I grant his opinion less weight because the bases for the doctor's medical conclusion concerning pneumoconiosis are unclear. The doctor's report fails to identify the criteria upon which he founds his opinion. Accordingly, his report is less probative, and I grant it less weight.

Dr. Broudy diagnosed chronic bronchitis in his March 1994 examination report. Although he did not diagnose clinical pneumoconiosis, his diagnosis of chronic bronchitis can establish legal pneumoconiosis if it is related to the claimant's coal mine employment. *See Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134, 1-139 (1999). I find the doctor's report well reasoned and well documented. Dr. Broudy provides explicit conclusions, and he includes analysis explaining the bases for his opinion. Accordingly, I grant his opinion probative weight.

Likewise, Dr. Dineen diagnosed chronic bronchitis secondary to smoking, but he did not diagnose clinical pneumoconiosis. I find his opinion well documented and well reasoned, and I grant it probative weight. The doctor based his negative diagnosis of clinical pneumoconiosis upon Claimant's chest x-ray, pulmonary function test results, and examination symptoms. Dr. Dineen did not, however, comment on the effect of Claimant's coal dust inhalation on Claimant's chronic bronchitis.

Dr. Wright diagnosed chronic smoker's bronchitis, but he did not diagnose coal workers' pneumoconiosis. I found the doctor's opinion to be well reasoned and well documented concerning the presence or absence of pneumoconiosis. Accordingly, I grant the doctor's opinion probative weight.

Dr. Wicker did not diagnose pneumoconiosis, but I find his opinion poorly reasoned. Dr. Wicker provided no bases for his opinion, except in his x-ray summary section when he stated that he saw no evidence of pneumoconiosis. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such reasoning alone does not constitute "sound" medical judgment under section 718.202(a)(4). *Id.* at 576. The Benefits Review Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113(1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). The Benefits Review Board explained that when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray...and not a reasoned medical opinion." *Id.* Accordingly, I grant the doctor's opinion little weight.

In his September 15, 2000 opinion, Dr. Broudy again diagnosed chronic bronchitis, but he did not diagnose clinical pneumoconiosis. The doctor based his diagnosis of chronic bronchitis on Claimant's physical examination. I find the doctor's report well documented, but I do not find his diagnosis concerning clinical pneumoconiosis well reasoned. Dr. Broudy provides no basis for his opinion, and, thus, his opinion is less probative. The doctor's diagnosis of legal pneumoconiosis is well reasoned, however. Dr. Broudy clearly states that his diagnosis is based upon his physical examination. Accordingly, I grant the doctor's opinion concerning the presence of legal pneumoconiosis probative weight.

I find Dr. Broudy's deposition testimony well reasoned and well documented. The doctor's testimony clearly explains his findings, and he details the bases for such conclusions. Furthermore, the doctor sufficiently explains his opinion concerning the cause of claimant's chronic bronchitis: smoking versus coal dust inhalation. Dr. Broudy explains that his observations during his physical examination led him to conclude that the cause of Claimant's bronchitis was his tobacco smoking. As I find his testimony well reasoned and documented, I grant it probative weight.

I grant Dr. Wiot's deposition no weight as a medical report as his testimony is solely based upon his x-ray interpretations. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Indeed, Dr. Wiot never physically examined Claimant.

I find Dr. Broudy's independent medical review well reasoned and well documented. I grant it less weight, however, as the report is narrowly tailored to answer specific questions. For example, in his previous two opinions addressing Claimant's pulmonary health, Dr. Broudy diagnosed chronic bronchitis due to smoking. In his independent medical review, Dr. Broudy never addresses chronic bronchitis; instead, the doctor only addresses whether Claimant suffers from clinical pneumoconiosis or chronic obstructive pulmonary disease. Thus, the doctor's report is not addressing whether Claimant suffers from legal pneumoconiosis in its myriad forms, as recognized by the Benefits Review Board. Asthma, asthmatic bronchitis, chronic bronchitis, chronic obstructive pulmonary disease and/or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983); *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134, 1-139 (1999). Because the doctor's report is so narrowly drawn, I find it less probative of the larger inquiry: does Claimant suffer from clinical or legal pneumoconiosis. Accordingly, I grant it less weight.

Dr. Vuskovich's independent medical review concerning pneumoconiosis is well documented and well reasoned. The doctor did not diagnose clinical pneumoconiosis, nor did he diagnose chronic bronchitis, as many other physicians did. The doctor explained that the pulmonary function test results lacked the "hallmark" interpretation of "chronic bronchitis, obstructive defect." Thus, the doctor did not opine that Claimant suffered from it. I grant the doctor's opinion probative weight.

Dr. Broudy's October 2002 deposition is well reasoned and well documented. Specifically, the doctor demonstrated his consideration of Claimant's coal dust inhalation and its effects of his chronic bronchitis. I grant the doctor's deposition probative weight.

No physician opined that Claimant suffered from clinical pneumoconiosis. The preponderance of the evidence, however, demonstrates that Claimant suffers from chronic bronchitis or emphysema. While Drs. Dahhan, Wicker, and Vuskovich did not diagnose chronic bronchitis or

emphysema, I find their opinions outweighed by the probative value of the opinions of Drs. Broudy (supplemented by his depositions), Dineen, and Wright and the pathology report of Dr. Chan.

Once it is determined that the miner suffers from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). Because Claimant has established over ten years of coal mine employment, he is entitled to a rebuttable presumption that his pneumoconiosis arose from coal mine employment. *See* 20 C.F.R. § 718.203(b). This presumption may be rebutted by evidence demonstrating another cause for claimant's pneumoconiosis.

In the instant case, I find this presumption has been rebutted. Every physician that diagnosed chronic bronchitis attributed the condition to Claimant's smoking. No physician attributed the bronchitis to coal dust inhalation.

I grant probative weight to Dr. Broudy's opinion on the causation of Claimant's legal pneumoconiosis. His reports and depositions adequately address both Claimant's smoking and coal dust inhalation as possible causes of his pulmonary problems, and Dr. Broudy adequately explains the reasons behind his decision to attribute the condition solely to Claimant's smoking habit.

I grant Dr. Dineen's opinion addressing the cause of Claimant's pulmonary problems less weight because the doctor failed to address the contributions of Claimant's coal dust inhalation to Claimant's pulmonary problems. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000)(holding that physician's failure to discuss effect of both coal dust inhalation and smoking of miner's pulmonary problems rendered opinion less probative).

Likewise, I grant less weight to Dr. Wright's opinion. While he attributed Claimant's "impairment" to smoking, he failed to address the effects of Claimant's coal dust inhalation.

I find the preponderance of the evidence addressing the cause of Claimant's chronic bronchitis establishes that Claimant's bronchitis was caused by tobacco smoking. I find the probative value of Dr. Broudy's opinions and depositions, combined with the limited probative value of the causation opinions of Drs. Dineen and Wright, rebut the causation presumption.

In Dr. Chan's biopsy report he diagnosed emphysema, however, he also opined that the emphysema was "clinically associated with recurrent pneumothorax." (DX 9). The doctor's report does not address coal dust inhalation, and, thus, it does not demonstrate legal pneumoconiosis.

The claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis arising out of coal mine employment. Thus, this claim cannot succeed. Regardless, even if the evidence had established this element, it fails to prove that claimant has a totally disabling respiratory impairment, another requisite element of entitlement.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b)(2) provides several criteria for establishing total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (b)(2)(ii), total disability may be established with qualifying pulmonary function tests or arterial blood gas studies.[6]

In the pulmonary function studies of record, there is a discrepancy in the height attributed to the claimant. The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). The reported heights range from 66 inches to 67 inches, with the exception of the reported height of 70 inches on Dr. Broudy's March 7, 1994 test. Due to the extreme variance of this height, I disregard it. For the remaining reported heights, the average reported height is 66.38 inches. Accordingly, I adopt 66.38 inches as Claimant's height for the instant case.

All ventilatory studies of record, both pre-bronchodilator and post-bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v.*

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[6]A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A "non-qualifying" test produces results that exceed the table values.

Consolidation Coal Co., 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981).

Several of the reported pulmonary function tests do not conform to the applicable quality standards. First, Dr. Baker's August 11, 1993 pulmonary function test is not accompanied by tracings. Thus, I discredit the results, and I will not consider them. Secondly, numerous tests reported poor patient effort, including the tests performed on February 26, 1994, July 11, 2000, and September 15, 2000. The poor effort exerted during the July 11, 2000 test is supported by Dr. Burki's validation study. To these tests, I grant no weight.

Setting aside the tests which are invalid or non-conforming, I am left with tests performed on March 7, 1994, March 21, 1994, and March 26, 1994. None of these tests produced qualifying results, and I consider each probative evidence weighing against a finding of total disability.

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated). Similarly, in *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1045 (10th Cir. 1990) and *Twin Pines Coal Co. v. U.S. DOL*, 854 F.2d 1212 (10th Cir. 1988), the court held that the administrative law judge must consider a physician's report which addresses the reliability and probative value of testing wherein he or she attributes qualifying results to non- respiratory factors such as age, altitude, or obesity.

The arterial blood gas studies conform to the applicable quality standards. The tests did not produce qualifying values, however. Accordingly, I find they present probative evidence weighing against a finding that Claimant is totally disabled.

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

In assessing total disability under § 718.204(c)(4), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, Case No. 99-3469 (6th Cir. 2000) (a finding of total disability may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations); *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993) (a qualified opinion regarding the miner's disability may be given less weight). *See also Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(en banc on recon.). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a prima facie finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

No physician in the instant case opined that Claimant was totally disabled. Several physicians, however, opined that Claimant suffered from a slight to mild pulmonary defect. As even a finding of a slight or mild pulmonary defect can prevent some miners from returning to their usual coal mine employment, I shall discuss and weigh each opinion separately.

I grant less than full probative weight to Dr. Dahhan's opinion. The doctor diagnosed a "possible" mild restrictive defect. Because of its equivocation, I grant the doctor's opinion little weight. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000)(finding report, where physician concluded that simple pneumoconiosis "probably" would not disrupt a miner's

pulmonary function, was equivocal); *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995) (holding treating physician's opinion entitled to little weight where he concluded that the miner "probably" had black lung disease).

I find Dr. Broudy's March 1994 opinion well reasoned and well documented. The doctor sufficiently demonstrates an understanding of the exertional requirements of Claimant's coal mining jobs and Claimant's physiologic capabilities, and his diagnosis of no total disability follows reasonably from the objective evidence contained within his report. Accordingly, I grant the doctor's opinion probative weight.

Dr. Dineen diagnosed Claimant with a minimal pulmonary obstruction, and he concluded that Claimant retained the pulmonary ability to perform his usual coal mine employment. However, the doctor also stated that Claimant suffers from no respiratory impairment. I find the doctor's opinion well reasoned and well documented. I interpret the doctor's apparent contradiction as nothing more than a poorly worded attempt to explain that Claimant's minimal obstructive defect renders no level of impairment on Claimant concerning his ability to perform his coal mining job. Otherwise, the doctor sufficiently demonstrates an understanding of the exertional requirements of Claimant's coal mining jobs and Claimant's physiologic capabilities, and his diagnosis of no total disability follows reasonably from the objective evidence contained within his report. I grant the doctor's opinion probative weight.

I find Dr. Wright's opinion to be well reasoned and well documented. The doctor adequately demonstrates his understanding of the exertional requirements of Claimant's coal mine employment and the exertional limitations of Claimant's pulmonary system. Furthermore, the doctor's conclusions are supported by the objective evidence contained within his report. Accordingly, I grant the doctor's opinion probative weight.

I grant no weight to Dr. Wicker's opinion as he failed to address Claimant's impairment level.

I find Dr. Broudy's September 2000 opinion, as supplemented by the doctor's December 2000 deposition, to be well reasoned and well documented. The doctor opined that Claimant retained the pulmonary ability to perform his usual coal mine employment, despite the presence of a mild impairment due to an obstructive defect. The doctor's opinion contains an adequate description of the coal mine employment worked by Claimant. The doctor also sufficiently explains his rationale to discredit the Claimant's pulmonary function test results, which he concluded were produced by suboptimal effort, and to instead make his conclusions based upon his observations during Claimant's physical examination. Dr. Broudy stated that the expiratory wheezes located during the physical examination usually suggested obstructive airways disease, as opposed to the mild restrictive defect produced by Claimant's suboptimal effort during the pulmonary function test. Accordingly, I grant the doctor's opinion probative weight.

I grant less weight to Dr. Broudy's September 2002 independent medical report, as supplemented by his October 2002 deposition, because I find it inadequately reasoned. Dr. Broudy's report fails to address Claimant's coal mine employment history with any specificity beyond stating the claimant worked underground for ten years. Thus, it is unclear if Dr. Broudy was sufficiently contemplating the exertional requirements of Claimant's coal mine employment when he opined that Claimant retained the pulmonary ability to perform his usual coal mine employment. More importantly, Dr. Broudy's report stated that five physicians concluded that Claimant possessed a slight pulmonary restriction, yet, in his final conclusions, Dr. Broudy stated that no evidence of any impairment arising from coal mine dust existed. The doctor's conclusions are narrowly tailored to answer questions from counsel. The doctor's narrow responses, however, limit the probative weight I attach to his opinion. It appears that the doctor locates some level of impairment; however, his final conclusions dance around the possibility of impairment due to smoking. The opinion's piece-meal analysis, unfortunately, detracts from the weight I can grant the opinion because I am unable to test the reasonableness of the doctor's whole analysis. Accordingly, I grant the doctor's opinion less weight.

I find Dr. Vuskovich's opinion addressing Claimant's level of impairment is poorly reasoned, and I grant it less probative weight. Dr. Vuskovich fails to address the numerous reports diagnosing a slight restrictive defect in his analysis where he merely concludes that there was "no pulmonary or respiratory impairment arising in whole or on [sic] part from his coal mining experience." (EX 1). Such a paucity of analysis does not render an opinion deserving of probative weight.

Considering the evidence addressing Claimant's impairment level as a whole, I find that the preponderance of the evidence demonstrates that Claimant is not totally disabled. The arterial blood gas studies all produced non-qualifying results, and the valid pulmonary function test results also failed to produce qualifying results. Furthermore, the narrative medical opinions were unanimous in their conclusions that Claimant was not totally disabled. Even granting Claimant a slight to mild pulmonary defect, no evidence supports the conclusion that Claimant is unable to perform his usual coal mine employment.

The latter half of Claimant's coal mine employment has consisted of driving a truck. His testimony revealed that the job was not significantly taxing. He testified that his job required him to drive, remove and replace a tarp on top of the truck, and, when loading, to shovel coal. (Tr. 58). At most, the job required light to moderate exertion, when considering the shoveling component. The other tasks required little exertion. For this Court to conclude that Claimant was unable to perform his job, from a pulmonary standpoint, a level of impairment much greater than that demonstrated by the record would be necessary, given the relatively light exertional requirements of the truck driving job. Thus, when I compare the exertional requirements of the claimant's usual coal mine employment with the evidence addressing Claimant's respiratory impairment, I find Claimant is not prevented, from a pulmonary standpoint, from performing his usual coal mine work or engaging in gainful employment comparable to his coal mine work. 20 C.F.R. §718.204(b)(1)(i-ii).

Conclusion

In sum, the evidence does not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory impairment. Accordingly, the claim of Albert Napier must be denied.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of Albert Napier for benefits under the Act is denied.

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JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.